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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SAMUEL TUIONO, Defendant and Appellant.	E071886 (Super.Ct.No. RIF1800197) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Samuel Tuiono of attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a), count 1) and robbery (§ 211, count 2). The jury also found true the allegation that he had personally discharged a firearm causing great bodily injury in the commission of both offenses. (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8).) (However, the jury found *not true* that the commission of count 1 was willful, deliberate, and premeditated.)

The trial court sentenced defendant to a total term of 32 years to life in state prison.[2] On appeal, he contends: (1) we should remand to permit the trial court to consider whether to modify the punishment imposed for the gun use from a 25-year-to-life term, under subdivision (d) of section 12022.53, to a lesser term under subdivisions (c) or (b) of section 12022.53; and (2) we should remand to give defendant the opportunity to request a hearing on his ability to pay the various fines and fees imposed. Defendant further contends there is a sentencing error in the abstract of judgment. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

Defendant (born in December 2000) responded to the victim's online offer to sell a backpack, agreeing to meet at a Riverside restaurant. On October 19, 2017, the victim,

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[1] Unless otherwise noted, all undesignated statutory references are to the Penal Code.

[2] Defendant's sentence is as follows: count 1 (attempted murder), seven years, plus a consecutive 25-year-to-life term for the gun use enhancement; count 2 (robbery), five years, plus a consecutive 25-year-to-life term for the gun use enhancement, with the total term on count 2 stayed. (§ 654).

his wife, and son arrived at the restaurant. While his family waited in the car, the victim brought the backpack into the restaurant where he saw two young men (later identified as defendant and B.H.).) The victim approached the young men and defendant suggested they go outside. Once outside, defendant pointed a gun at the victim's face and said, "'Look, Cuz, it's a stick-up.'" Defendant and B.H. began walking away with the victim's backpack, without paying for it; however, the victim followed. When the victim got close to defendant, he fired his gun, shooting the victim in the thigh.

II. DISCUSSION

A. Remand of the Firearm Enhancement Sentence Is Not Warranted.

Defendant requested the trial court to exercise its discretion to dismiss his firearm enhancement, and the request was denied. Recognizing its discretion within section 12022.53, subdivision (h)(1), to strike or dismiss the enhancement if the interest of justice so required, the court explained, "I don't know how you get there. I don't know how the interest of justice would" support striking the enhancement. Nevertheless, relying on *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), defendant contends the matter must be remanded to allow the trial court to exercise its discretion to potentially impose a lesser, uncharged firearm enhancement under section 12022.53, subdivisions (b) or (c). This court has already addressed a claim under *Morrison* and concluded the statute does not afford any such additional options (*People v. Yanez* (2020) 44 Cal.App.5th 452, 457-460 (*Yanez*)), and we therefore decline to remand the matter on this basis.

Section 12022.53 sets forth three different sentence enhancements for a defendant's personal use of a firearm in the commission of enumerated offenses: a 10-year enhancement when a defendant personally uses a firearm, but does not discharge it (§ 12022.53, subd. (b)); a 20-year enhancement when a defendant personally and intentionally discharges a firearm, but the discharge does not cause great bodily injury or death (§ 12022.53, subd. (c)); and a 25-year-to-life enhancement when a defendant personally and intentionally discharges a firearm causing great bodily injury or death (§ 12022.53, subd. (d)). In 2017, the Legislature amended the statute to include the following: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. . . ." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)

Given this change in the statute, the *Morrison* court concluded that the trial court has the discretion to impose a lesser included, uncharged enhancement (§ 12022.53, subds. (b) or (c)) in the interests of justice pursuant to section 1385, notwithstanding a finding by the trier of fact in support of a greater enhancement (§ 12022.53, subd. (d)). (*Morrison*, *supra*, 34 Cal.App.5th at pp. 222-223.) However, our colleagues in the Fifth District reached the opposite conclusion in *People v. Tirado* (2019) 38 Cal.App.5th 637 (*Tirado*), review granted November 13, 2019, S257658. The *Tirado* court decided that the statute contained no language suggesting the Legislature intended to grant such discretion in sentencing. (*Id.* at pp. 642-644.) As we stated in *Yanez*, "[a]fter conducting our own independent analysis of section 12022.53, subdivision (h), we agree with the conclusion reached in *Tirado*." (*Yanez, supra*, 44 Cal.App.5th at p. 458.)

Applying the fundamental rules of statutory interpretation, we conclude that "nothing in the plain language of sections 1385 or 12022.53, subdivision (h) suggests an intent to allow a trial court discretion to substitute one sentencing enhancement for another." (*Yanez, supra*, 44 Cal.App.5th at p. 459.) Rather, "the Legislature's use of the words 'strike' or 'dismiss' indicates the court's power pursuant to these sections is binary." (*Ibid.*; cf. *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1229 (*Harvey*) [same conclusion when considering the plain meaning of the term "strike" in the context of a similar drug sentencing enhancement].)

In *Harvey*, the appellate court examined Health and Safety Code section 11370.4, subdivision (e), which affords the trial court with the discretion to "strike" an enhancement if it finds mitigating circumstances. (*Harvey*, *supra*, 233 Cal.App.3d at p. 1229.) In deciding that the word "strike" did not include discretion to impose a lesser enhancement, the court explained: "The wording of the section makes it clear that the sentencing court has only two alternatives. If the court does not feel there are mitigating circumstances sufficient to justify the striking of the enhancement, it must impose the enhancement. Otherwise, if it finds that mitigating circumstances do exist which would justify striking the enhancement, it may be stricken. Nowhere does the section indicate the court may impose only a portion of the enhancement. In interpreting the statute, the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. [Citation.] Nowhere in the statute does it indicate the court has any discretion besides either imposing the full enhancement or striking it in its entirety." (*Harvey*, at pp. 1229-1230.) The same reasoning applies here.

Moreover, as we explained in *Yanez*, under the separation of powers principle, "we decline to adopt an interpretation of section 12022.53, subdivision (h) which would vest the trial court with discretionary power to essentially modify a charge brought by the prosecutor despite sufficient evidence to support such a charge." (*Yanez, supra*, 44 Cal.App.5th at p. 460.)

Here, the People charged defendant with the gun enhancement under section 12022.53, subdivision (d), the jury found the allegation true, and defendant does not challenge this finding as contrary to the law or claim insufficient evidence justifies the imposition of a lesser enhancement. (§ 1181 [To the extent the Legislature has provided statutory authority for a trial court to modify a verdict in order to impose a lesser offense or lesser punishment than that found true by a jury, it has specified that such should occur only when the verdict is contrary to the law or evidence.].) Because we reach a conclusion contrary to that in *Morrison*, we decline to remand the matter for resentencing on the ground the trial court has the option of imposing a lesser, uncharged enhancement.

B. No Correction of the Abstract of Judgment Is Required.

Defendant contends, and the People agree, the abstract of judgment does not reflect the trial court's oral pronouncement of judgment with respect to certain fines and fees. They assert the abstract of judgment requires correction. We disagree.

Defendant suffered two convictions. The court operations fee is mandatory (*People v. Woods* (2010) 191 Cal.App.4th 269, 272 [court operations fee and court facilities fees are mandatory]), and requires a $40 assessment be imposed on every

conviction (Pen. Code, § 1465.8, subd. (a)(1)). Likewise, the conviction assessment/court facility fee is mandatory and requires a $30 assessment be imposed on every conviction. (Gov. Code, § 70373.) The minute order and the abstract of judgment indicate an $80 court operations assessment ($40 for each conviction) was imposed even though the trial court orally imposed $60, and a $60 conviction assessment ($30 for each conviction) was imposed even though the court orally imposed $40. Generally, an oral pronouncement of judgment controls (*People v. Mitchell* (2001) 26 Cal.4th 181, 185) but, where fees and fines are mandatory, "their omission may be corrected for the first time on appeal." (*People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530; see *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328 [trial court erred by failing to impose court operations fee for each of defendant's convictions, even if the sentence on a conviction was stayed]; see also *People v. Smith* (2001) 24 Cal.4th 849, 853 [whenever a sentence includes a period of parole, a parole revocation fine equal to the restitution fine "must" be imposed].)

Here, the minutes and abstract of judgment correctly state the mandatory fees, notwithstanding the oral pronouncement of sentence. No modification is required.

C. Imposition of Fines, Fees, and Assessments.

Defendant asserts that under the reasoning in *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168 (*Dueñas*), the imposition of a $60 conviction assessment/court facility fee (Gov. Code, § 70373), an $80 court operations assessment/fee (Pen. Code, § 1465.8),[3] and a $300 restitution fine (Pen. Code, § 1202.4)

[3] See discussion in section II.B., *ante*.

[footnote continued on next page]

without a determination that he has the ability to pay violated his rights under the due process, equal protection, and excessive fines clauses of the federal and California constitutions. He asks us to remand the matter to allow him to request an ability to pay hearing on his various fines. The People acknowledge the holding in *Dueñas* and contend that if we determine the trial court erred in failing to hold an ability to pay hearing before imposing the nonpunitive assessments, the error is harmless beyond a reasonable doubt because defendant is unable to show an inability to pay these assessments given his good physical health and lengthy sentence. As to the $300 restitution fine, the People assert the fine is "a form of punishment, and should principally be examined in light of the excessive fines clause, under which ability to pay is not determinative."[4]

We conclude remand is not necessary for an ability to pay hearing given defendant's lengthy sentence and the likelihood of his ability to earn prison wages.

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[4] "It makes no difference whether we examine the issue as an excessive fine or a violation of due process." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*. (2005) 37 Cal.4th 707, 728 [considering an excessive fine challenge to the civil penalty imposed under Health & Saf. Code, § 118950, subd. (d)]; *People v. Castellano* (2019) 33 Cal.App.5th 485, 490 ["imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections"]; *Dueñas, supra,* 30 Cal.App.5th at p. 1171, fn. 8.)

1. Further background information.

According to the probation officer's report, at the time of his sentencing, defendant was approximately six weeks from turning 18 years old, five feet 11 inches tall, and weighed 229 pounds. He was single, had no children, had no income or expenses, and had completed the 10th grade. He had good physical health, with no physical limitations or disabilities. The report recommended the trial court order defendant to pay a $10,000 restitution fine (Pen. Code, §§ 1202.4, 2085.5), a $60 criminal conviction fee (Gov. Code, § 70373), and an $80 court operations fee (Pen. Code, § 1465.8, subd. (a)(1)). At the sentencing hearing, the trial court ordered defendant to pay the recommended amounts (see fn. 3), with the exception of the restitution fine, which the court imposed in the amount of $300. The court never conducted a hearing, nor commented, on defendant's ability to pay, and defense counsel never raised the issue.

2. Applicable Law.

The *Dueñas* court concluded: "[T]he assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas, supra*, 30 Cal.App.5th at p. 1168; accord, *People v. Belloso*

(2019) 42 Cal.App.5th 647, 654-655 (*Belloso*).)[5] In contrast to court assessments, a restitution fine under Penal Code section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas*, at p. 1169; accord, *Belloso*, at p. 655.) Penal Code section 1202.4, subdivision (c), expressly provides a defendant's inability to pay a restitution fine may not be considered as a "compelling and extraordinary reasons" not to impose the statutory minimum fine.

This court has addressed the claim of *Dueñas* error and concluded a defendant who has not objected to the imposition of a restitution fine and court assessments has not forfeited the issue on appeal. (*Jones*, *supra*, 36 Cal.App.5th at pp. 1031-1034 [no forfeiture for failing to object to imposition of minimum restitution fine ($300) and court security fee ($70)].) We also concluded a *Dueñas* error may be harmless if the record shows a defendant will be able to earn the total amount imposed during imprisonment. (*Jones*, at pp. 1034-1035 [a defendant who was sentenced to state prison for a term of six years—with a presentence custody and conduct credit of 332 days—would earn sufficient prison wages to pay fines and assessments of $370].)

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[5] Several Courts of Appeal, including this court (*People v. Jones* (2019) 36 Cal.App.5th 1028, 1030-1035 (*Jones*)) have applied the analysis in *Dueñas* (e.g., *People v. Santos* (2019) 38 Cal.App.5th 923, 929-934; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95-96, review granted Nov. 13, 2019, S257844 [applying due process analysis to court assessments]). Others have rejected the due process analysis (e.g., *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-281; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946) or concluded the imposition of fines and fees should be analyzed under the excessive fines clause of the Eighth Amendment (e.g., *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1061; *People v. Kopp*, at pp. 96-97 [applying excessive fines analysis to restitution fines]).

Here, defendant challenges the imposition of the minimum restitution fine ($300), the criminal conviction fee ($60), and the court operations fee ($80) on the basis there was no determination of his ability to pay. However, the record contains sufficient evidence to support his ability to pay the amounts imposed given his sentence of 32 years in state prison. The trial court is presumed to know the law (*People v. Thomas* (2011) 52 Cal.4th 336, 361), which includes the requirement that "every able-bodied prisoner imprisoned in any state prison" must perform labor for compensation. (§ 2700.) The record reflects that at the time of sentencing, defendant was less than six weeks from turning 18 years old, five feet 11 inches tall, weighed 229 pounds, and had no disabilities. His health was described as "good," he was not married, and he did not have any children.

In the absence of some indication that defendant has a disability precluding him from performing any type of labor in prison, it must be presumed that he is capable of earning prison wages. (See *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1377, fn. 6.) The trial court could properly consider these wages and find, albeit implicitly, that defendant can afford to pay the ordered fees through his prison wages. (See *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [court may consider ability to earn prison wages in determining ability to pay]; *Jones*, *supra*, 36 Cal.App.5th at p. 1035 ["Wages in California prisons currently range from $12 to $56 a month. [Citations.] And half of any wages earned (along with half of any deposits made into [a prisoner's] trust account) are deducted to pay any outstanding restitution fine."].) Also, there is no evidence defendant has any other financial obligations that would interfere with his ability to pay. Although

there is no guarantee defendant will actually obtain paid labor while serving his prison term, in the absence of contrary evidence we must assume he will become eligible for it during his lengthy prison sentence.

For the above reasons, we conclude remand is unnecessary.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.